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DOMINICA TOYAT DOMINIC

v.

PETER WEE TECK HO

B

HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[SUIT NO: 22-40-2006]
3 SEPTEMBER 2008

C ***TORT:*** *Defamation - Slander - Claim for damages and injunction - Natural and ordinary meaning of words - Whether defamatory - Innuendo - Pleadings - Defence - Rules of the High Court 1980, O. 78*

CIVIL PROCEDURE: *Pleadings - Defamation - Slander - Particulars - Rules of the High Court 1980, O. 78*

D

This was a claim by the plaintiff for damages and an injunction against the defendant for slander in respect of the words "bekas aku ia you" spoken by the defendant. The plaintiff alleged that the defendant spoke and published of the plaintiff those words in
E the presence of third parties, which in their natural and ordinary meaning and/or by way of innuendo conveyed that plaintiff was his ex-lover and/or mistress. The words connoted a woman of loose character with lax morals and were calculated to expose the plaintiff to contempt in the mind of a reasonable man. In
F consequence, the plaintiff's reputation had been seriously damaged and she had suffered considerable hurt and distress. The defendant denied that the words were defamatory as alleged by the plaintiff, contending that they were true in substance and in fact. He further asserted that the plaintiff's action was based on a
G hearsay complaint and ought to be dismissed.

Held (dismissing the claim):

(1) The plaintiff's claim must be dismissed for the following
H reasons: (i) the alleged words "bekas aku ia you" told to third parties could not by any imagination be imputed to mean unchastity or adultery. In this time and era, the words "ex-girlfriend" or "ex-wife" are commonly used and no reasonable man will take it to mean that the woman is of bad character.
I It may be insulting in nature when the relationship has broken up but it will not be construed to be defamatory; (ii) whether

the alleged words are defamatory is a question for the court to decide and no opinion from a third person is necessary, unless it is innuendo and the particulars have been pleaded. In this case, one witness, PW5, claiming to be an expert in Bahasa Melayu gave his opinion in favour of the plaintiff, which evidence had gone beyond the scope of translation and must be rejected. Further, there was no mention in the pleadings for the court to take cognisance of the evidence relating to innuendo; (iii) the plaintiff had also not complied with the requirement of O. 78 of the Rules of the High Court 1980 in relation to pleadings which was fatal to the case, more so when the plaintiff was also relying on the concept of innuendo; and (iv) the plaintiff and the defendant were known to each other and in this context, the defendant's evidence was more probable as his version was consistent with the facts of this case. Hence, there was no necessity for further elaboration save to say that the defendant had succeeded in his defence. (para 12)

Case(s) referred to:

Ambrose Chung Hock Guan v. Christopher Kelawing Knight & Ors (Civil Suit No: 22-15-2004 (MR)) (Unreported) ***(refd)***

C Sivanathan v. Abdullah Dato' Hj A Rahman [1984] 1 CLJ 89; [1984] 2 CLJ (Rep) 463 HC ***(refd)***

Chew Peng Cheng v. Anthony Teo Tiao Gin [2008] 8 CLJ 418 HC ***(refd)***

Chin Choon v. Chua Jui Meng [2005] 2 CLJ 569 CA ***(refd)***

Chop Kim Lee Seng Kee v. Yeo Kiat Jin [1955] 1 LNS 19 ***(refd)***

Hassan & Anor v. Wan Ishak & Ors [1960] 1 LNS 34 ***(refd)***

Joceline Tan Poh Choo & Ors v. V Muthusamy [2003] 3 CLJ 705 CA ***(refd)***

Jones v. Skeleton [1963] 3 All ER 952 ***(refd)***

Lim Kit Siang v. Datuk Dr Ling Liong Sik & Ors [1996] 1 LNS 106 ***(refd)***

Luk Kai Lam v. Sim Ai Leng [1978] 1 LNS 110 ***(refd)***

Mohd Onn Muda v. Saniboey Mohd Ismail & Anor [1998] 1 CLJ 569 HC ***(refd)***

Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 1 LNS 146 ***(refd)***

Tan Eng Seong v. Malayan Banking Berhad [1997] 2 CLJ Supp 552 HC ***(refd)***

Zolkefly Haron v. Yahya Chik & Anor [2001] 6 CLJ 285 HC ***(refd)***

Legislation referred to:

Defamation Act 1957, ss. 4, 6

Penal Code, s. 499

Rules of the High Court 1980, O. 78 r. 3(1), (2)

A *For the plaintiff - Ateng Jeros; M/s Ateng Jeros & Co Advocates*
For the defendant - Ratna Dewi; M/s Idris & Co Advocates

Reported by Suresh Nathan

B

JUDGMENT

Hamid Sultan Abu Backer JC:

C **[1]** This is my judgment in respect of the plaintiff's claim for damages and injunction against the defendant for slander in respect of words spoken by the defendant, namely "bekas aku ia you".

[2] At the commencement of the hearing, parties have agreed D that the case can be heard by way of: (i) witness statement for examination in chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination);(iii) preliminary re-examination statement with full liberty to further re-examination if there is E further oral examination. The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purpose, preliminary cross-examination witness statement will stand as F interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

Brief Facts (Plaintiff's Version)

G **[3]** In the statement of claim, the plaintiff has stated that both the plaintiff and the defendant are business persons. The brief statement of claim *inter alia* reads as follows:

> On or about the 18th day of December, 2005, at the Riverside Sea Food, Mukah the defendant spoke and published of the H plaintiff in the presence and hearing of Masrah Bin Junaidi whose address and is Kampung Penipah, Mukah and Ramli Bin Ibrahirn whose address was and is Kampung Baru, Bintulu, the following words which are highly defamatory of the plaintiff, "bekas aku ia you". The English translation of the said words is as follows: "Friends, she is my ex".

I

The words spoken and uttered by the defendant in their natural and ordinary meaning and/or by way of innuendo conveyed that the plaintiff was his ex-lover and/or mistress. It connotes a loose character woman with a lax moral.

The defendant published that he was the 3rd person in the plaintiff's marriage, imputing adultery, unchastity or immoral behaviour on the part of the plaintiff.

The words complained of by the plaintiff were calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of reasonable man or that such words tend to lower the plaintiff in the esteem of right thinking members of the public generally..

In consequence, the plaintiff's reputation has been seriously damaged and she has suffered considerable hurt, distress and embarrassment.

[4] The defendant denies the allegation and says: (i) the alleged defamatory words complained of, are not capable in their natural and ordinary meaning and/or by innuendo of connoting a loose charactered woman with lax morals as alleged by the plaintiff; (ii) allegedly uttered words by the defendant are true in-substance and fact. The defendant gives particulars under O. 78 r. 3(2) Rules of the High Court 1980 as follows: (a) it is indeed true that the plaintiff is the former girlfriend of the defendant; (b) the plaintiff used to meet the defendant at an outlet known as Nibong Karaoke in Mukah; (c) the plaintiff used to tell the defendant of her financial difficulties and the problems she had with her husband; (d) the relationship between the plaintiff and the defendant turned sour when both of them had an argument once at Nibong Karaoke in Mukah; and (e) in a small town like Mukah, where the defendant resides, most people are capable of knowing the fact that the plaintiff was the former girl friend of the defendant. (iii) there is no publication involved and as such is not actionable. The defendant further asserts that the plaintiff's action is based on a hearsay complaint, made by persons unknown to the defendant, to concoct a frivolous and vexatious claim against the defendant, etc and says that the action ought to be dismissed.

Preliminaries

[5] Five witnesses gave evidence for the plaintiff and one gave evidence for the defendant. The plaintiff adduced evidence in excess of what was pleaded. The statement of claim did not comply with O. 78 of the Rules of the High Court 1980. Further,

there was no attempt in the pleadings to show how the phrase "bekas aku ia you" imputes adultery, or unchastity or immoral behaviour as complained by the plaintiff for it to be actionable *per se* without the need to prove special damage. (Sections 4 and 6 DA 1957; *C. Sivanathan v. Abdullah Dato' Hj A Rahman* [1984] 1 CLJ 89; [1984] 2 CLJ (Rep) 463).

[6] In addition, the plaintiff was not able to justify as to why the action was filed in the High Court when the award of damages for slander in Malaysia has been below RM250,000, and the court has often awarded only nominal sums after taking into consideration the following factors in assessing damages ie; (a) the gravity of the allegation, (b) the size and influence of the circulation, (c) the effect of the publication, (d) the extent and nature of the claimant's reputation, (e) the behaviour of the defendant, (f) the behaviour of the claimant (see *Chin Choon v. Chua Jui Meng* [2005] 2 CLJ 569, *C. Sivanathan v. Abdullah Dato' Hj A Rahman* [1984] 1 CLJ 89; [1984] 2 CLJ (Rep) 463, *Tan Eng Seong v. Malayan Banking Berhad* [1997] 2 CLJ Supp 552), *Hassan & Anor v. Wan Ishak & Ors* [1960] 1 LNS 34, *Chop Kim Lee Seng Kee v. Yeo Kiat Jin* [1955] 1 LNS 19. In fact the Federal Court in *Luk Kai Lam v. Sim Ai Leng* [1978] 1 LNS 110, awarded a nominal sum of RM1,500 only for calling a staff nurse as prostitute. The purported slander in this instant case is very much less serious than in the case of *Luk Kai Lam.*

Law On Slander

[7] I have dealt with the law of defamation relating to libel in detail in the case of *Chew Peng Cheng v. Anthony Teo Tiao Gin* [2008] 8 CLJ 418 and *Ambrose Chung Hock Guan v. Christopher Kelawing Knight & 5 Ors*, Miri High Court Civil Suit No. 22-15-2004 (MR). I do not propose to state the same here save that this judgment must be read with those judgments in relation to the law and defences in connection to defamation action for completeness of the law only.

[8] The law in respect of libel and slander in Malaysia originates from the common law, which has been modified by the Defamation Act 1957. The rules of pleading are governed by the rules of court. (See RHC O. 78 1980, SCR 1980). Statements or representations which are expressed by speech or its equivalent, for example, shaking of the head, finger language, smile etc may

qualify under the expression of slander. But, defamation differs from insult caused by words or representation. While the former is a wrong done to the regard or esteem in which one is held by others; the latter is an injury only to one's dignity or self respect. It is trite that the former is an actionable wrong, but mere insult is not actionable *per se* though there may be some remedies other than the law of defamation.

[9] Libel and slander is made a criminal offence under s. 499 of the Penal Code which reads as follows:

> Whoever, by words either spoken or intended to be read or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

From the reading of the above section, it will be clear that the elements required to prove defamation, have been made much easier in contrast to a civil action, though the remedies like injunction and compensation are not available. In the instant case the plaintiff has not taken any step to prefer a criminal complaint or prosecute a criminal complaint, and/or prefer a private prosecution pursuant to Criminal Procedure Code.

[10] It is trite that s. 4 of DA 1957 recognises the fact that words spoken and published which implies unchastity or adultery of any woman or girl shall not require special damage to render them actionable. However, the burden is on the plaintiff to show that the words spoken and published impute unchastity or adultery. At times, it will be abundantly clear that the words spoken impute the same. For example in *Luk Kai Lam v. Sim Ai Leng* [1978] 1 LNS 110 the Federal Court held that the oral allegation that a staff nurse was a prostitute was sufficient to be actionable without proof of damage. It may be difficult in some other cases. For example in our case the words spoken were "bekas aku ia you". The meaning is determined in accordance with the following established principles. Namely, the court decides the natural and ordinary meaning as a question of fact, by attributing to the words the meaning which the court considers that they would convey to ordinary reasonable persons. It may not be limited to the literal meaning of the words but may include

any inference or implication which can be reasonably drawn. In *Jones v. Skeleton* [1963] 3 All ER 952 the Privy Council opined:

> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words.

Further, with regard to innuendo, O. 78 r. 3(1) of RHC 1980 sets out a mandatory requirement for the plaintiff to give particulars of the facts and matter on which the plaintiff relies. The plaintiff must plead what the words complained of mean when so construed, or where the words are obscure or capable of more than one meaning, the other meaning must be pleaded. (See *Mohd Onn Muda v. Saniboey Mohd Ismail & Anor* [1998] 1 CLJ 569). Evidentially, it is not correct for the plaintiff to lead evidence in respect of innuendo as done in the instant case without pleading the same.

Defendant's Argument

[11] The defendant says that for the plaintiff to succeed, the plaintiff must establish: (i) the alleged words were defamatory in nature, (ii) it referred to the plaintiff, (iii) and there was publication. The defendant asserts that the alleged defamatory words must be considered in their natural and ordinary meaning and relies on the case of *Joceline Tan Poh Choo & Ors v. V. Muthusamy* [2003] 3 CLJ 705 and *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 1 LNS 146 where it was stated:

> Thus the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty ...

The defendant relies on the following cases too, namely:

(a) *Lim Kit Siang v. Datuk Dr Ling Liong Sik & Ors* [1996] 1 LNS 106, where it was held that the alleged defamatory words must be reproduced in verbatim in the statement of claim and that it is not sufficient to merely describe the substance, purpose or effect of the words. The court also held that there must be identification of the part of the statement which was alleged to be defamatory. Without it, even if there was a valid cause of action, the plaintiff cannot succeed.

(b) *Zolkefly Haron v. Yahya Chik & Anor* [2001] 6 CLJ 285, where it was held that the exact language of which complaint is made, ie, the actual words used and not just their substance, must be set out.

The defendant argues that based on the case of *Lim Kit Siang v. Datuk Dr. Ling Liong Sik & Ors (supra)* and *Zolkefly Haron (supra)*, the translated version of the alleged defamatory words only discussed about the effect of the words rather than its natural and ordinary meaning.

[12] I have heard the evidence, read the documents and submission of the parties in detail. I take the view, that the plaintiff's claim must be dismissed. My reasons are as follows:

(a) It is my judgment that the alleged word "bekas aku ia you" told to 3rd parties, cannot by any imagination be imputed to mean unchastity or adultery. In this time and era, the words ex-girlfriend or ex-wife are commonly used and no reasonable man will take it to mean that the women is of bad character. It may be insulting in nature when the relationship has broken up but as I have said previously, it will not be construed to be defamatory.

(b) Whether the alleged word is defamatory, is a question for the court to decide and no opinion from 3rd person is necessary unless it is innuendo and the particulars have been pleaded. In this case, one witness claiming to be an expert in Bahasa Melayu gave his opinion as follows:

The said words comprise of three words in the Malay language and one word in the English language. Bekas is a noun/adjective form and in this context means previously (presently no longer), has been.

Aku is first person pronoun singular used in informal context. The word is used in the conversation of a group who knows each other in a casual atmosphere.

Ia is a third person pronoun singular in this context to refer to the complainant/plaintiff.

You is a pronoun second person in the English language to refer to the person hearing the said words spoken by the defendant.

Based on the above meaning, the words spoken by implication, in the social cultural context under the Malay diaspora, that is, the Melanau community conveys the meaning which is very negative from the view of the person speaking the words in respect of the person to whom the words were directed in the context of the spoken words.

In the socio cultural context of the speaker of the Malay language, such words were in fact meant to degrade the person to whom the words were directed, especially to the context of the complainant/plaintiff who complained that she had been slapped by the defendant as per the police report that she made.

From the semantic point of view, the said words convey the meaning that the complainant/plaintiff can be viewed as a woman who was previously kept by the defendant in the context of an illicit relationship (because they are not a legal couple in the eyes of the law). That being the case, the complainant/plaintiff can be considered as a woman whose moral/reputation is jeopardized because she was involved in a degrading activity.

In the context of Malaysian community, the use of such words towards a woman by a man who had been accused of committing physical violence towards her will be considered an act to degrade the woman concerned. This is very serious because members of the community will have a negative perception and bear contempt toward a woman who has a low moral. Therefore the moral/ status of the complainant/plaintiff will be seriously defamed and in certain circumstances is very degrading.

From the moral point of view, the complainant/plaintiff has to shoulder a stigma which would probably stay in the community and its surrounding area for a long time.

I agree with the defendant's submission that the evidence of PW5 has gone beyond the scope of translation and must be rejected. Further, there was no mention in the pleading, for the court to take cognisance of the evidence relating to innuendo.

(c) The plaintiff has also not complied with the requirement of O. 78 of RHC 1980 in relation to pleadings which is fatal to the case, more so when the plaintiff is also relying on the concept of innuendo.

(d) It is my finding that the plaintiff and the defendant are known to each other and in this context I accept the evidence of the defendant as more probable, as his version is consistent with the facts of this case. Therefore, I think it is not necessary for me to further elaborate on this, save to say that the defendant has succeeded in his defence.

[13] In relation to costs, I will say much judicial time of the High Court has been wasted to deal with this action, which in all probabilities ought to have been dealt with by a magistrate.

[14] In *Chew Peng Cheng v. Anthony Teo Tiao Gin (supra)*, I had stated as follows:

> The law on defamation is nothing more than judge made law never having been defined intelligibly from the time it was recognised as a tort. In addition, it is regrettably seen as a necessity to promote social harmony and to ensure that a person's integrity and dignity is not blemished without the pain of being compensated in monetary terms by persons who breach the sacred code and imprecise definition. In any commonwealth countries such as India and Malaysia, this tort has been statutorily codified, as a penal offence. Arguably it can be said that after it being codified courts should not have followed the common law remedy of defamation. Failing to do so, has promoted too many number of cases filed in a time and era where court has been inundated with much work. Courts' resources without being utilized to clear pending criminal cases where prisoners are languishing in prisons, are much used to hear this tort (when there is already an adequate criminal remedy to maintain social order and harmony) for one purpose, ie, to compensate the plaintiff.

> In fact, I will go to the extent of saying that time has come for parliament to make defamation purely a criminal offence and make provisions for the criminal courts to order compensation, providing for a statutory maximum limit and/or alternatively to have all defamation matters heard before a magistrate or sessions judge, giving them the jurisdiction to hear and award damages to a defined maximum limit. There is no reason for a High Court judge to hear defamation suits at the expense of tax payers when the court is inundated with much work more so when substantial numbers of prisoners facing capital punishment are languishing in jail.

It is common knowledge that most defamation suits are filed in the High Court and this takes much judicial time, as these cases are often time consuming, and in consequence contribute to back log. The instant case is a classic example of how the jurisdiction of the High Court is abused by the filing of a suit which can be dealt before a magistrate. Further, freedom to publish in internet is also likely to increase defamation action. This requires Parliament to enact provisions to arrest such abuse. It is time that Parliament amends the law for all defamation suits to be dealt with by criminal courts, with proviso for interlocutory relief's such as injunction, discovery, *anton pillar* order etc, similar to the remedies available in the civil courts with provision to asses damages; to protect abuse of process in such proposed criminal proceedings of court, to require the applicant to obtain leave from court to commence private criminal prosecution against the tort of defamation; and also to make appropriate amendment to Criminal Procedure Code, to provide user friendly terms for private prosecution. For, it must not be overlooked that the tort whether libel or slander, when defamatory may also be a violent assault on the aggrieved person and the mental and emotional effect may be more serious than grievous injury which cannot at times be compensated with costs. It will be appropriate also for Parliament to consider whipping when the defamation is spiked with *malice* purely to assassinate the character of the individual personally and destroy his family, quality of life and privacy.

The law of defamation must not curb freedom of speech in the right perspective or curb the concept of transparency or accountability or good governances being questioned but when statements are made with *malice* then the injured must be adequately compensated and the perpetrator severely punished.

[15] For reason stated above, (except para. 14), I dismiss the plaintiff's claim with costs. The getting up fees shall not exceed RM30,000. If costs cannot be agreed the defendant is at liberty to tax the costs.

I hereby order so.